89-1201

No. 89-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Montana Supreme Court

Noel K. Larrivee
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Attorney of Record for
Petitioner

QUESTION PRESENTED

The issue presented for review is whether Montana Code Annotated (M.C.A.) Section 61-8-401(4)(c), as highlighted below, is unconstitutional on the grounds that it conflicts with the Defendant's presumption of innocence and is violative of the Defendant's due process rights. The pertinent parts of this statute provide:

> 61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> * * *
>
> (3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.
> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle

while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:

* * *

(c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

I N D E X

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No. 89-_____

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LESTER C. TOLLEFSON,

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STATE OF MONTANA,

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PETITION FOR WRIT OF CERTIORARI

To the Montana Supreme Court

Petitioner, Lester C. Tollefson, prays a writ of certiorari issue to review the judgment of the Montana Supreme Court entered September 21, 1989, and Order Denying Request for Reconsideration entered

October 31, 1989.

OPINIONS BELOW

The Opinion and Order of the Montana Supreme Court (App.1) is reported at 780 P.2d 621 (Mont.1989) and the Order (denying reconsideration, App.2) is not reported.

The texts of the opinion of the Montana Supreme Court, overruling a Missoula County Justice Court decision, are both set forth in full in the appendix to this Petition.

JURISDICTION

The Order and Opinion of the Montana Supreme Court was filed September 21, 1989. Timely Motion for Reconsideration and Request for Oral Argument was filed, and was denied on October 31, 1989. This Court has jurisdiction under 28 U.S.C.A. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant Montana statutory provision is set out in pertinent part as follows:

> 61-8-401. Persons under the influence of alcohol or drugs. (1) It is unlawful and punishable as provided in 61-8-714 and 61-8-723 for any person who is under the influence of:
> (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
>
> * * *
>
> (3) "Under the influence" means that as a result of taking into the body alcohol . . . a person's ability to safely operate a motor vehicle has been diminished.
> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
> * * *
>
> (c) If there was at that time an

alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The issue is whether this statutory presumption (highlighted) conflicts with the Fourteenth Amendment of the U.S. Constitution. The Fourteenth Amendment states in pertinent part:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In addition, the following provision of the Montana Rules of Evidence has application to the issue presented:

"Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. **Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption'.**" (Emphasis supplied)

STATEMENT OF THE CASE

The Missoula County Justice Court set out the underlying facts and issues presented in its May 22, 1989, Order as follows:

"The Defendant in this case has been charged with DUI. After his arrest on April 18, 1989, the Defendant submitted to a blood test results of which showed a BAC level of 0.18, which evidence the State intends to introduce at the time of trial. This case was set to come to trial on May 11, 1989, but was continued upon the Court's receipt of the Plaintiff's unopposed Motion to continue based upon a scheduling conflict with an expert witness. The Defense has filed a Motion in Limine which asks the Court to declare a clause of the current DUI statute unconstitutional in that the offending clause violates the Defendant's presumption of innocence by

creating a mandatory rebuttable presumption to the contrary. The Defense further moves the Court to prohibit the State from introducing any evidence of the Defendant's blood alcohol level."

The Justice Court declared the statutory language unconstitutional on May 22, 1989 (App.3). Thereafter, the Justice Court denied the State's motion for reconsideration on July 13, 1989 (App.4). The State sought, and obtained, a writ of supervisory control in which the Montana Supreme Court issued its Opinion and Order dated September 21, 1989 (App.1). The Defendant's motion for reconsideration and request for oral argument was denied October 31, 1989, and this appeal followed.

The Defendant seeks review of the Montana Supreme Court's ruling, and reinstatement of the Justice Court's order declaring the

offending statute unconstitutional.

REASONS FOR GRANTING THE WRIT

I. MCA 61-8-401(4)(c) IS UNCONSTITUTIONAL.

To sustain the charge of driving under the influence of alcohol, the State of Montana must prove that the Defendant:

1. Was driving a motor vehicle,

2. upon the ways of this state open to the public,

3. within Missoula County, Montana

4. while under the influence of alcohol.

"Under the influence" means that as a result of alcohol a person's ability to safely operate a motor vehicle has been diminished.

See M.C.A. Section 61-8-401.

Since the first three elements of this crime are easily proven, and generally undisputable, the fourth element "while

under the influence of alcohol" is the linchpin of the State's case. Proving "under the influence" requires proof that a person's ability to safely operate a motor vehicle has been diminished. But, Section 61-8-401(4)(c) resolves that issue for the State as well.

M.C.A. Section 61-8-401(4)(c) provides that if the accused's blood alcohol concentration is 0.10 or more, "it shall be presumed that the person was under the influence of alcohol. Such a presumption is rebuttable." M.C.A. Section 61-8-401(4)(c) is unconstitutional for several reasons.

A. SECTION 61-8-401(4)(c) VIOLATES THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

Essentially, once it has been established that the Defendant's blood alcohol concentration is 0.10 or more,

Section 61-8-401(4)(c) permits the Court to assume that the Defendant was under the influence of alcohol without any further evidence. This permits the Court to prejudge a conclusion which the Court should reach of its own volition.

> "A presumption which would permit the Court to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." (Emphasis in original) Sandstrom v. State of Montana, 442 U.S. 510, 522, 99 S.Ct. 2450, 2458, (1979).

Section 61-8-401(4)(c) is thus unconstitutional because it violates the Defendant's presumption of innocence.

Similarly, this same issue was addressed in City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983). In Shea, supra, the Montana Supreme Court stated:

> "Rule 301(b)(2), Mont.R.Evid., states that a disputable presumption 'may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.' Thus, the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate constitutional due process requirements by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid."

Id. at 414.

The Missoula County Justice Court found the cited statute unconstitutional. In a careful, detailed analysis contained in a seventeen page opinion, the Justice Court traced the history of both U.S. and State Supreme Court cases relevant to the issue presented. The Justice Court carefully considered each of the State's arguments, and those additional statements raised in the State's Motion for Reconsideration, and rejected them.

The Justice Court began with a correct identification of the challenged language, and discussed the effect of such presumptions:

> "Moreover, MRE 301 provides with respect to presumptions:
>
> > (a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the proceeding.

and also,

(1) Conclusive presumptions are presumptions specifically declared conclusive by statute.
(2) All presumptions, other than conclusive presumptions are disputable and may be controverted.

A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

The Defense argues that the presumption is, albeit rebuttable, nonetheless mandatory and serves to relieve the state of its obligatory burden of persuasion in a criminal case to prove <u>every element</u> of the charge beyond reasonable doubt. The element at issue under the DUI presumption is that of 'being under the influence', a fact which the jury is directed by statute to presume <u>if</u> it finds that the Defendant had, at the

> time he was in actual physical control of a motor vehicle, a BAC level of 0.10 or greater. Such a presumption with respect to the ultimate issue or to an element thereof is precisely what is precluded by the due process clause of the 14th Amendment, a preclusion which has been sanctioned in Sandstrom et al, supra."

The Justice Court then traced the evolution of cases addressing the question of presumptions in criminal cases, including Sandstrom v. State of Montana, 442 U.S. 510, 99 S.Ct. 2450, (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, (1985); City of Missoula v. Shea, 202 Mont. 286, 661 P.2d 410 (1983), and most recently, Rolle v. State of Florida, 528 So.2d 1208 (Fla.App.4Dist. 1988).

The Justice Court recognized the precedent set by Sandstrom and Shea,

"In Shea, the Montana Court, referencing Winship and Sandstrom acknowledged that '[d]ecisions of the United States Supreme Court on due process questions are binding on us.' (Shea p. 313)."

The Justice Court has correctly found the presumption mandatory and rejected the State's argument that it merely created a "permissive inference":

> "A review of the language in MCA 61-8-401(4) reveals that the presumption is mandated by law. That statute provides that in the appropriate proceeding (DUI cases), the Defendant's BAC level, as shown by chemical analysis ". . . shall give rise to the following presumptions: . . .
>
> > (c) if there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable."

The language of 'shall' is

clear and unambiguous. The jury is directed by law, upon a finding that the Defendant had a BAC of 0.10 or more, to presume that the Defendant was under the influence.

Consider now the definition of what it is that the fact finder is obligated to do, -i.e., make a presumption. We saw that the definition of presumption under Montana law, quoted above (MRE 301) is '. . . an assumption of fact that the law requires to be made from another fact or group of facts . . .' (emphasis added). Furthermore, in the case of disputable presumptions - the sort under consideration here, even though these may be overcome by a preponderance of evidence contrary to the presumption, nevertheless '[u]nless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.'

We should explicitly notice here that the due process requirements hold with respect to every element of the offense as charged by the State (See Sandstrom, Supra p. 510).

The condition of 'being under the influence' is one element which the state must prove if it is to prove its case in a DUI charge.

With this in mind then it is clear from the above that in DUI cases in which the State has proven beyond a reasonable doubt that the Defendant had at the time he was in control of a motor vehicle a BAC level of 0.10 or more, that the fact finder is obligated as a matter of law to presume that the Defendant was, at the time, under the influence. It is also clear that since, by definition, the fact finder must find that the Defendant was under the influence unless the presumption is overcome, then just as the Court ruled in Shea, here too '. . . the trier of fact is not free to accept or reject the presumption,' and where this is the case, there is a violation of '. . . constitutional due process requirement by shifting the burden of persuasion to the Defendant' and thereby (1) '. . . contradicting the presumption of innocence,' and thus (2) rendering the presumption '. . . unconstitutional and

invalid.' (Shea p. 414).'

Rolle, supra, represents the most recent pronouncement by any other appellate level court on the question presented here, and in that case, the Florida appellate court struck down language nearly identical to that raised here based upon its reading of Sandstrom and Franklin.

B. SECTION 61-8-401 (4)(c) CREATES AN UNCONSTITUTIONAL MANDATORY PRESUMPTION.

The State must prove every element of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the Defendant. Sandstrom, 442 U.S. at 524, 99 S.Ct. at 2459. But, Section 61-8-401(4)(c) provides that it shall be presumed that the person was under the influence of alcohol if the BAC was 0.10 or more. Thus Section 61-8-401(4)(c) is an

unconstitutional mandatory rebuttable presumption because it relieves "the state of its burden of proof of the essential element of impairment by instructing the Court not that it has a choice to determine whether the Defendant was impaired based upon the results of a mechanical test, but that it must accept as proven the essential fact of impairment if the test result shows a blood alcohol reading of 0.10% or more." Rolle v. State of Florida, 528 So.2d 1208 (Fla.App.4Dist. 1988).

As the U.S. Supreme Court noted in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, (1985), "A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed

element by instructing the Court that it must find the presumed element unless the Defendant persuades the Court not to make such a finding . . . such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." 471 U.S. at 317, 105 S.Ct. 1972-73. See also, Sandstrom v. State of Montana, 442 U.S. 510, 523-524, 99 S.Ct. 2450, 2459 (1979); County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 2225 (1979).

Thus M.C.A. Section 61-8-401(4)(c) creates an unconstitutional mandatory rebuttable presumption.

C. "THE PRESUMPTION IS REBUTTABLE" IS MISLEADING.

The State has argued that Section 61-8-401(4)(c) provides that "Such presumption is rebuttable." However,

> "The very statement that the presumption 'may be rebutted' could have indicated to a reasonable juror that the Defendant bore an affirmative burden of persuasion once the State proved the underlying act giving rise to the presumption. Standing alone, the challenged language undeniably created an unconstitutional burden-shifting presumption with respect to the [presumption]." Francis v. Franklin, 471 U.S. 318, 105 S.Ct. 1973.

Further, Montana Rule of Evidence 301(b)(2) provides that a presumption "may be overcome by a preponderance of evidence contrary to the presumption." Such a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of driving under the influence. See also Sandstrom v. State of

Montana, 442 U.S. at 518, 99 S.Ct. at 2456.

In its opinion and order dated September 21, 1989, the Montana Supreme Court states that the language merely creates a "permissive inference." A careful reading of the statutory language, especially when considered in the context of the rules of evidence, makes the terminology mandatory and not permissive.

Clearly, the language "the presumption may be rebutted" does not remedy the constitutional defect in M.C.A. Section 61-8-401(4)(c).

II. THE ISSUE RAISES A SUBSTANTIAL QUESTION OF CONSTITUTIONAL PROPORTIONS, NATIONWIDE IN SCOPE.

The issue raised here is based upon statutory language found throughout the traffic codes of the fifty states.

Thousands of individuals are prosecuted each year in all fifty states, under statutory provisions similar or identical to that challenged here. Under the circumstances, there exists a substantial constitutional question that has national significance and such issue should be reviewed by this Court.

CONCLUSION

M.C.A. Section 61-8-401(4)(c), (1) violates the Defendant's presumption of innocence, and (2) creates an impermissible mandatory rebuttable presumption, and thus should be declared unconstitutional by this Court.

Respectfully submitted this 26th day of December, 1989.

LARRIVEE LAW OFFICES

Noel K. Larrivee

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23nd day of January, 1990, a true and correct copy of the foregoing Petition for Writ of Certiorari, as modified, was mailed, postage pre-paid to the Respondent's counsel at the following address:

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula, MT 59802

Marc Racicot
Montana Attorney General
3rd Floor, Justice Building
215 North Sanders
Helena, MT 59620

Noel K. Larrivee

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LESTER C. TOLLEFSON,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

APPENDIX TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

APPENDIX 1

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 89-417

STATE OF MONTANA,

Plaintiff and Petitioner,

v.

LESTER C. TOLLEFSON,

Defendant and Respondent.

) ORDER
) AND
) OPINION

This matter is before the Court on the application of the State of Montana for a writ of supervisory control. The State seeks review of an order of the Justice Court, Missoula County. That court, in ruling upon defendant's motion in limine, found unconstitutional Section 61-8-401(4)(c), MCA, on the presumptive effect of blood alcohol content in a DUI case. Lester C. Tollefson has filed a response to the State's application for supervisory control.

Supervisory control is sometimes justified where there is no remedy by appeal or other remedial procedure to provide relief and where extraordinary circumstances are present. Rule 17, M.R.App.P.; State v. District Court (Mont. 1981), 632 P.2d 318, 322, 38 St.Rep. 1204, 1208. The parties to this case agree that this Court should take supervisory control.

A disturbing aspect in this case is that there is no record because the case comes to us from Justice Court. Adequate review of a question of constitutional magnitude is difficult at best under these circumstances. We therefore question whether a justice court can be a proper forum for consideration of the constitutionality of a statute. However, because the State may not appeal the ruling of the Justice Court and because of the statewide significance of

the issue involved, the Court concludes that supervisory control is justified.

Section 61-8-401(4)(c), MCA, provides:

> (4) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by a chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions:
>
> . . .
>
> (c) If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The Justice Court found that the statutory language "it shall be presumed that the person was under the influence of alcohol" relieved the State from being required to prove every element of a criminal case beyond a reasonable doubt. Relying on Sandstrom v. State of Montana (1979), 442

U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, and other cases, the court then declared Section 61-8-401(4)(c), MCA, unconstitutional.

When interpretations of a statute may vary, courts will choose a constitutional interpretation over an unconstitutional one. Department of State Lands v. Pettibone (1985), 216 Mont. 361, 374, 702 P.2d 948, 956. In construing statutes nearly identical to the challenged statute, several state courts have found those statutes to be constitutional. Barnes v. People (Colo. 1987), 735 P.2d 869; State v. Dacey (Vt. 1980), 418 A.2d 856; State v. Coates (Wash.App. 1977), 563 P.2d 208, Commonwealth v. DiFrancesco (Pa. 1974), 329 A.2d 204. The above state courts have interpreted the language used in their statutes to create a permissive inference, not a mandatory presumption.

For purposes of this case, we interpret Section 61-8-401(4)(c), MCA, to create a permissive inference that the person was under the influence of alcohol. We reverse the Justice Court's declaration of unconstitutionality and we direct the court to deny defendant's motion in limine to exclude evidence of blood alcohol content. Because our ruling is for purposes of this case only, this issue may be raised in the event defendant is convicted and obtains a trial de novo in district court.

DATED this 21st day of September, 1989.

/s/ J.A. Turnage

/s/ John Conway Harrison

/s/ John C. Sheehy

/s/ Fred J. Weber

/s/ William E. Hunt, Sr.

/s/ R.C. McDonough

/s/ Diane G. Barz

APPENDIX 2

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 89-417

STATE OF MONTANA,

Plaintiff and Petitioner,

v.) O R D E R

LESTER C. TOLLEFSON,

Defendant and Respondent.

The motion for reconsideration and request for oral argument is denied.

DATED this 31st day of October, 1989.

/s/ J.A. Turnage

/s/ John Conway Harrison

/s/ John C. Sheehy

/s/ Fred J. Weber

/s/ William E. Hunt, Sr.

/s/ R.C. McDonough

/s/ Diane G. Barz

APPENDIX 3

IN THE JUSTICE COURT, MISSOULA COUNTY, MONTANA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA
Plaintiff

-vs- ORDER

LESTER C. TOLLEFSON
Defendant

CASE NO: CO57585

BACKGROUND

The Defendant in this case has been charged with DUI. After his arrest on April 18, 1989, the Defendant submitted to a blood test results of which showed a BAC level of 0.18 which evidence the State intends to introduce at the time of trial. This case was set to come to trial on May 11, 1989, but was continued upon the Court's receipt of the Plaintiff's unopposed Motion to continue based upon a scheduling conflict with an expert

witness. The Defense has filed a Motion in Limine which asks the Court to declare a clause of the current DUI statute unconstitutional in that the offending clause violates the Defendant's presumption of innocence by creating a mandatory rebuttable presumption to the contrary. The Defense further moves the Court to prohibit the State from introducing any evidence of the Defendant's blood alcohol level.

The State opposes the Defense on both issues. The State declares that the DUI statute <u>is</u> constitutionally sound, and that, even if it is not, it is improper to exclude evidence about the Defendant's BAC level. The State therefore asks the Court to deny the Defendant's Motion in Limine in its entirety.

The position of both parties have been set forth in their respective briefs and, more recently on May 8, 1989, in oral argument presented in open court.

DISCUSSION

The Defense contends that U.S. Supreme Court decisions, most notably Sandstrom v State of Montana, 442 US 510-524, (1979) and thereafter Francis v Franklin, 471 US 307-327, (1985), and finally, a Montana Supreme Court decision also following Sandstrom, viz., City of Missoula v Shea, 661 P2d, 410 (1983), and most recently, Rolle v State of Florida, 13 F.L.W., (4th District Florida, Apr. 27, 1988, #87-2089), collectively expose the present Montana DUI statute 61-8-401(4)(c) to be in conflict with the constitutional safeguard of due process as guaranteed by

the 14th Amendment. Clause (4) of this statute provides, in relevant part

> Upon the trial of any civil or criminal action or proceeding arising out of acts to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood at the time alleged, as shown by the chemical analysis of the person's blood, urine, breath or other bodily substance, shall give rise to the following presumptions;...
>
> (4)(c)
>
> If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

Moreover, MRE 301 provides with respect to presumptions

> (a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the proceeding.

and also,

> (1) Conclusive presumptions are presumptions specifically declared conclusive by statute.
>
> (2) All presumptions, other than conclusive presumptions are disputable and may be controverted.

> A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

The Defense argues that the presumption is, albeit rebuttable, nonetheless mandatory and serves to relieve the state of its obligatory burden of persuasion in a criminal case to prove <u>every element</u> of the charge beyond reasonable doubt. The element at issue under the DUI presumption is that of "being under the influence", a fact which the jury is directed by statute to presume <u>if</u> it finds that the Defendant had, at the time he was in actual physical control of a motor vehicle, a BAC level of 0.10 or greater. Such a presumption with respect to the ultimate issue or to an element thereof is precisely what is precluded by the due process clause of the

14th Amendment, a preclusion which has been sanctioned in Sandstrom et al, Supra.

The Defense goes on to maintain that once the State is unable to rely upon a constitutionally unsound presumption, then evidence about BAC levels is at once rendered irrelevant. For if the jury cannot receive the instruction which requires them to infer the presumed fact from the supportive fact, and thus cannot receive lawful instruction which informs them of the significance of the BAC level, they will have no basis upon which to evaluate this information. Without this basis, the Defense believes evidence about BAC levels to be either more confusing and/or prejudicial than probative.

In response to the Defendant's arguments, the State asks the Court to consider an arsenal of cases which establish that the presumption contained within the DUI statute is constitutionally sound, the most significant of which seem to be County Court of Ulster County v Allen, 442 US 140, (1979), and State of Vermont v Dacey, VT. 418 A2d, 856, (1980). From these and similar cases cited in the State's brief, the State's arguments come into focus as follows:

1) Where there is a strong rational connection between facts, here, "...between the basic fact and the fact to be presumed, a presumption does not invade the fact finder's task of reviewing the evidence...[and hence]...there is no breach of a Defendant's constitutional rights." ((State's brief, p.3), see also

Ulster County Supra, pp. 157-59). The State goes on to maintain that their "rational connection" is well-established and well-documented.

2) These cases reveal that the presumption contained within 61-8-401 MCA is not mandatory, but is permissive. The State again relies upon Ulster County, contending that given the appropriate "rational connection" between the underlying and the presumed facts, the presumption may be construed as permissive, and if permissive, no shifting of the burden of persuasion occurs.

The State also draws support from Dacey, Supra, which is a DUI case involving a statutory presumption similar to that in 61-8-401 MCA. In this case the Vermont

Supreme Court found that the presumption was (a) permissive and not mandatory, and (b) that such a presumption would not invade the province of the fact finder and (c) not shift the burden of proof.

3) The State also maintains that any determination of whether a statutory presumption creates a constitutional conflict must be decided on a case by case basis. That is, if the nature of the presumption at issue as viewed by the finder of fact, depends upon the instructions of law which are actually read and submitted to the jury, the Court must not decide in advance whether such institutions are constitutionally infirm. Moreover, the trial court has the power to fashion the instructions in such a way that it can attempt to meet the

constitutional safeguards. Then, whether it successfully does so is a matter for an appellate court to decide.

4) Finally, the State argues that the Rolle case is to be distinguished from those cases relied upon by the Defense since the language in Rolle speaks, not of a presumption, but of a prima facie case. This difference then, is believed to constitute a significant differentiation and is not to be relied upon as a basis to make a similar ruling about presumption.

ANALYSIS

I

Sandstrom was a deliberate homicide case, where Sandstrom was charged with "purposely or knowingly" causing the victim's death. The Defendant maintained

that while he had killed the victim, he did not do so purposely or knowingly. The jury was instructed that "(t)he law presumes that a person intends the ordinary consequences of his voluntary acts." The Defense objected that this instruction had the effect of shifting the burden of proof with respect to an element of the alleged offense, viz., the mental state. Upon appeal, the Montana Supreme Court held that while "shifting the burden of proof to the Defendant by means of a presumption is prohibited, allocation of "some burden of proof" to a Defendant is permissible. "The Court held further since the Defendant was obligated only to provide some evidence that he lacked the requisite intent, the instruction did not violate due process standards. However, the U.S. Supreme Court reversed, and held

that the instruction was unconstitutional.

In Sandstrom, the US Court held that "The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. "Presumptions are either mandatory or permissive, and if mandatory, either conclusive or rebuttable. While the US Court here was careful not to usurp the authority of the Montana Court in interpreting Montana law, and thus did not rule that the jury instruction created a mandatory as opposed to a permissible presumption, it nevertheless emphatically pointed out that an interpretation of the instruction as being mandatory and even conclusive was not unreasonable under Montana law. It may have been viewed as

conclusive since the jury was not instructed otherwise. Yet even if understood as a rebuttable presumption, the Court pointed out that Montana law does state that "Unless the [disputable] presumption is overcome, the trier of fact must find the presumed fact in accordance with the presumption". MRE Rule 3(6)(2). (Sandstrom, p. 518, Supra.)

Considerations akin to the above led the US Court to conclude that a reasonable man - "here, apparently the drafter of Montana's own Rules of Evidence - could interpret the presumption at issue in this case as shifting the burden of proving his innocence by a preponderance of the evidence." (Sandstrom, p. 518, notes, Supra.). The Court reasoned further that

"...the question before this court is whether the challenged jury instruction had the effect of relieving the State of its burden of proof enumerated in Winship (infra) on the critical question of the petitioner's state of mind." (Emphasis added).

In In re Winship, 397 US 358 (1970), the US Court articulated the appropriate mode of constitutional analysis for presumptions.

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (Sandstrom p. 520.)

In Sandstrom, then, the Court followed Winship and went on to hold

> Because the jury may have interpreted the challenged presumption as conclusive... or as shifting the

> burden of persuasion... and because either interpretation would have violated the Fourteenth Amendment requirement that the State prove every element of a criminal offense beyond a reasonable doubt, the instruction is unconstitutional. (P.510)(Emphasis added)

and again,

> A presumption which, although not conclusive, had the effect of shifting the burden of persuasion to petitioner, would have suffered from similar infirmities. (P.511)

and again,

> Because David Sandstrom's jury may have interpreted the judge's instruction as constituting either a burden shifting presumption...or a conclusive presumption...and because either interpretation would have deprived the Defendant of his right to the due process law, we hold the instruction given in this case as unconstitutional. (Sandstrom p.524)(Emphasis added)

It is clear from the above that the US Supreme Court then has taken the position that whatever the nature of the presumption, mandatory or otherwise, if such a presumption either shifts the

burden of proof or can be reasonably interpreted as an instruction to shift the burden, the presumption is unconstitutional.

In Francis v Franklin, Supra, the U.S. Supreme Court reaffirmed its decision in Sandstrom in a similar case. Upon a discussion of the various types of presumptions the Court stated

> A mandatory rebuttable presumption ... relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the Defendant's perspective, but it is no less unconstitutional. (Franklin p. 317).

In City of Missoula v Shea, the Montana Supreme Court was faced with the task of, among other things, the prima facie presumption in the City's parking

ordinance, Sec. 20-184, which read

> Presumption in Reference to Illegal Parking. (a) In any prosecution charging a violation of any law or regulation governing the standing or the parking of a vehicle, proof that the particular vehicle described on the complaint was parked in violation of any such law or regulation, together with proof that the defendant named in the complaint was at the time of such parking the registered owner of the vehicle, shall constitute in evidence a prima facie presumption that the registered owner of such vehicle was the person who parked or placed such vehicle where, for the time during which, such violation occurred. (Shea, p.412)

In Shea, the Montana Court, referencing Winship and Sandstrom acknowledged that "[d]ecisions of the United States Supreme Court on due process questions are binding on us." (Shea, p.313) The Court then went on to hold that the parking ordinance created a disputable presumption which, under Montana law requires that if the presumption is not overcome, then

"...the trier of fact is not free to accept or reject the presumption" (MRE 301(6)(2)). Thus,

> ... the trier of fact is not free to accept or reject the presumption. The effect of the presumption is to violate the constitutional due process requirement by shifting the burden of persuasion to defendant and contradicting the presumption of innocence. (Shea p.414)

Finally,

> We therefore come to the conclusion that the prima facie presumption is unconstitutional and invalid. (Shea p.414)

II

Following Sandstrom's standard of threshold inquiry for constitutional analysis applicable to this case, this Court must first determine the nature of the presumption at issue.

A review of the language in MCA 61-8-401(4) reveals that the presumption

is mandated by law. That statute provides that in the appropriate proceeding (DUI cases), the Defendant's BAC level, as shown by chemical analysis

> ... shall give rise to the following presumptions:..... (c) if there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol. Such presumption is rebuttable.

The language of 'shall' is clear and unambiguous. The jury is directed by law, upon a finding that the Defendant had a BAC of 0.10 or more, to presume that the Defendant was under the influence.

Consider now the definition of what it is that the fact finder is obligated to do, - i.e., make a presumption. We saw that the definition of presumption under Montana law, quoted above (MRE 301) is "...an assumption of fact that the law requires

to be made from another factor group of facts..." (emphasis added). Furthermore, in the case of disputable presumptions - the sort under consideration here, even though these may be overcome by a preponderance of evidence contrary to the presumption, nevertheless "[U]nless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."

We should explicitly notice here that the due process requirements hold with respect to every element of the offense as charged by the State (See Sandstrom, Supra p.510). The condition of "being under the influence" is one element which the state must prove if it is to prove its case in a DUI charge.

With this in mind then it is clear from the above that in DUI cases in which the State has proven beyond a reasonable doubt that the Defendant had at the time he was in control of a motor vehicle a BAC level of 0.10 or more, that the fact finder is obligated as a matter of law to presume that the Defendant was, at the time, under the influence. It is also clear that since, by definition, the fact finder must find that the Defendant was under the influence unless the presumption is overcome, then Just as the Court ruled in Shea, here too "...the trier of fact is not free to accept or reject the presumption.", and where this is the case, there is a violation of "... constitutional due process requirement by shifting the burden of persuasion to the Defendant" and thereby

(1)"...contradicting the presumption of innocence," and thus (2) rendering the presumption "...unconstitutional and invalid.". (Shea, p.414)

III

We may now review the challenges presented by the State. The State maintains first that the presence of a strong rational connection between the operative and presumed facts will correct any constitutional difficulties. It relies mainly upon Ulster County.

In Ulster County, the U.S. Supreme Court rejected the earlier ruling of the US Court of Appeals which found that the presumption at issue was both mandatory and unconstitutional. The Court ruled that the presumption was permissive and not mandatory, and, that since it was

permissive, the "rational connection" between the underlying and presumed facts need only to be that the latter is ''more likely than not to flow from the former." (Ulster County, Supra., p. 165.). That Court also concluded that where the presumption is mandatory, the State "...may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." (Ulster County p. 167)

This latter finding is construed by the State to suggest that where the reasonable doubt standard is met, mandatory presumptions are not unconstitutional. There is no need to attempt to determine whether such was the intent of the US Supreme Court in the Ulster case. Here,

it is crucial to notice that Ulster predates Sandstrom. In Sandstrom and subsequent cases cited above, the US Court has made clear that whatever the constitutional requirement is for the rational connection between the predicate and the presumed facts, this requirement is merely a necessary condition for constitutionality, and is never a sufficient condition. The key considerations beyond "rational connection" are that (1) the State must not be relieved of its burden of persuasion on the element in question beyond a reasonable doubt (see Franklin, p. 308) and (2) the fact finder must not be required to make the inference to the presumed fact, i.e., the presumption must not shift the burden of proof (see Sandstrom, p. 510.). This standard is

both recognized and adopted by the Montana Supreme Court in Shea, p.413 & 414.).

Thus, it is of little consequence in itself that the "rational connection" between "having a BAC greater than or equal to 0.10 " and "being under the influence" may be well-established. If constitutional integrity is to be achieved, the State must also show that the Montana DUI presumption does not shift the burden of proof and thereby relieve the State of its burden of persuasion and deprive the Defendant of the constitutionally entitled presumption of innocence.

Here, the State again relies upon Ulster, but in Ulster, the Supreme Court overturned the US Appellate Court because

it found that the trial court adequately instructed the jury that the presumption (from being a passenger apprehended in a car with handgun hidden inside to being in possession of those handguns) could be made only upon making certain other findings, and that in any case, there is a controlling "...mandatory presumption of innocence in favor of the Defendants ...unless [the jury] ... is satisfied beyond a reasonable doubt that the Defendants possessed the handguns...") (Ulster County, p. 162).

Since the jury was not required to infer the presumed fact, the US Court ruled that the presumption was indeed permissive. This situation
does not hold under Montana Evidentiary and DUI law.

The State also draws upon Dacey, which is a Vermont DUI case. There, the Vermont Supreme Court ruled that the presumption created within their DUI statute, which is very similar to that of Montana, was a permissive and not a mandatory presumption. The trial court's instruction to the jury which stated, among other things, that the presumption "...is not a presumption of guilt. The Defendant retains presumption of innocence throughout the trial..." but also stated that the State "...has the benefit of the presumption... that the Defendant was under the influence of intoxicating liquor...[and]...If you do not believe the testimony of the Defendant, introduced to rebut this presumption, the presumption stands." The Vermont Supreme Court correctly held that this instruction was

confusing and misleading and may have had the effect of shifting the burden proof with respect to an element of the case. Thus, the case was reversed and remanded.

Of course, the findings of sister states are not binding on Montana courts; their value consists in the opportunity to explore the rationale behind their rulings. In this case, such exploration is limited since, although the DUI statutes contain highly similar language about presumptions, this court has no information about the definition of presumption under Vermont law. However, if that definition is virtually the same as that of Montana law, it is the position of this Court that the Vermont court erred in its finding that the presumption is merely permissive. If the definition

differs substantially, then the Vermont case is not relevant to the Montana case.

Finally, it is clear that the Vermont court held that any jury instruction which may leave the impression with the Jury that they must find the presumed fact to hold unless it is rebutted was unconstitutional. As seen earlier, this situation is precisely that which is required under the Montana definition of presumption. Therefore, it appears that the Vermont case does not support the State's contention that the Montana DUI presumption is permissive and fails to shift the burden of proof.

The State also argues that any unconstitutional difficulty with the Montana

statutes can be corrected by a jury instruction which makes it clear that the presumption is in fact permissive. This intriguing prospect is not one for which this Court can find any support.

It is not the duty or responsibility or even within the province of the Court to rewrite the law. The responsibility of the Court is to interpret and apply the general law to particular cases. Here, the Court can instruct the jury only with respect to what the law in fact says, not with respect to what it would say if it were paraphrased in a way that made its application constitutional.

In this case, the Court can consider only the statutory law, and the common law handed down by Montana and U.S. Supreme

Courts. The Montana DUI and Evidentiary laws create a mandatory presumption which require the fact finder to infer the presumed fact from the operative fact. The presumed fact is an element of every DUI case. Both the U.S. and Montana Supreme Courts have ruled that presumption of this nature are unconstitutional. Any jury instruction which would correct this is either itself unlawful (since the court would have to perform a legislative act to create such an instruction) or, is in direct conflict with existing Montana law and could only confuse the jury if coupled as an instruction with the current law. Neither of these alternatives is acceptable.

Finally, the State maintained that the Montana DUI cases should be distinguished

from the Rolle case since the latter involved the creation of a prima facie case. This argument must fail. A prima facie case has been established, by definition, when the Plaintiff has shifted the burden of proof. A presumption, if mandatory and rebuttable shifts the burden of proof by requiring that the presumed fact be found to be the case unless rebutted. The two terms thus constitute a distinction without a difference.

If 61-8-401(4c) is unconstitutional, should the State then be allowed to introduce evidence of the Defendant's BAC level in the absence of an instruction which explains the particular relevance of this evidence? MRE 401 provides that

> Relevant evidence means any evidence that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Yet, even though relevant, MRE 403 allows that if

> ...the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury ...

the evidence may be excluded. Otherwise, "All relevant evidence is admissible." (MRE 402).

In the case before the Court, this Court believes that evidence of the Defendant's BAC level is clearly relevant but has not been provided with grounds to lead it to believe that the probative value of the introduction of evidence pertaining to BAC levels is substantially outweighed by the considerations of MRE 403.

CONCLUSION

Given the definition of presumption under the MRE and the ruling of the US Supreme Court in Sandstrom et al, and of the

Montana Supreme Court in Shea, this Court finds that MCA 61-8-401(4)(c) is constitutionally infirm in that it creates a mandatory presumption with respect to an element of the charge that the fact finder is not free to reject, and which, even though rebuttable, violates the Defendant's presumption of innocence. This presumption is constitutionally invalid.

Furthermore, the Court finds that, the introduction of evidence regarding the Defendant's blood alcohol level is, not withstanding the above, more probative than prejudicial and, excepting a showing to the contrary, holds such evidence to be admissible.

From the aforementioned, this Court now gives the following:

ORDER

1) The Defendant's Motion to declare 61-8-401(4c) MCA unconstitutional is granted and the State will not be entitled to rely upon the statutory presumption at trial.

2) The Defendant's Motion to exclude evidence relating to the Defendant's blood alcohol level is denied.

So ordered.

5-22-89
ENTERED

/S/ David K. Clark
JUSTICE OF THE PEACE
DEPARTMENT #1

APPENDIX 4

IN THE JUSTICE COURT, MISSOULA COUNTY, MONTANA
BEFORE DAVID K. CLARK, JUSTICE OF THE PEACE

STATE OF MONTANA
Plaintiff

-vs- ORDER

LESTER C. TOLLEFSON
Defendant

RE: State's Motion to Reconsider

DISCUSSION

On June 23rd, 1989, the State filed a Motion for Reconsideration of this Court's May 22, 1989 ruling that 61-8-401(4c) MCA, is unconstitutional. Thereafter, both parties have completed and submitted written argument regarding the Motion.

It is the State's contention that the section of law in dispute is indeed constitutional. The argument runs that if

constitutional interpretations of a statute are favored over those interpretations which are not constitutional, and, there is an interpretation of clause (4c) of the existing Montana DUI law which is constitutional, the Court should give to that law the constitutional interpretation. Since it is the case that under Montana law a constitutional interpretation of a statute is favored over one that is not, (Department of State Lands v. Pettibone, 702 p2d 948 (1985); T&W Chevrolet v. Darvial 641 P2d i368 (1982);) and since there is an interpretation of 61-8-401 (4c) which is constitutional, the Court is obligated to render its interpretation of the statute accordingly. Ultimately, the Court is then to instruct the Jury in keeping with the constitutional interpretation.

The State also maintains that State v. Kramp, 651 P2d, 614 (1982), provides authorization for the "...substitution of proper jury instructions to protect a defendant's rights." (State's Brief on Motion for Reconsideration, p.4). Based upon Kramp, the State asserts that the following instructions be submitted to jury as "...proper statement of law." (States Brief, p.4).

> You are instructed that if the Defendant has an alcohol concentration in his blood, breath or urine of 0.10 or more, you are permitted, but not required to infer that he was under the influence of alcohol. It is your exclusive province to determine whether the facts and circumstances shown by the evidence warrant the inference to be drawn by you. You must weigh the evidence presented and decide whether the State has proven beyond a reasonable doubt that the Defendant was under the influence of alcohol.

The Defense opposes the State's Motion on the grounds that these considerations

introduce little that is new and do not rebut the Court's position taken on May 22, 1989 in presenting in its decision. Furthermore, the Defense holds that consideration of specific jury instructions prior to trial and as a condition for determination of a constitutional issue is improper and premature.

The State's Motion here is premised on the contention that where there exist opposing interpretations of a statute, one constitutional and the other not, the Court is to favor the constitutional interpretation. It is the finding of this Court that this premise is true but irrelevant since there is no legitimate constitutional interpretation of 61-8-401 (4c) MCA.

The cases cited by the State show that the competing interpretation must derive from an ambiguity in the interpreted body of law. In T&W, the ambiguity concerned whether the Consumer Protection Act was sufficiently specific in meaning to meet due process requirements. T&W, pps. 1370-1). In Pettibone, the dissention centered upon whether 77-6-115 MCA applied to water rights or only to improvements (Pettibone, p. 956).

No such ambiguity exists here. The statutory language is both clear and emphatic, and the State has benefited from its clear meaning on each occasion in the past on which the statute has been presented to the jury as an instruction. The language of "...shall presume..." (61-8-401 4c), and of "...requires to be made from another fact... & "must find the assumed fact in

accordance with the presumption." (MRE 301) leave no doubt but that a reasonable person would understand the presumption as mandatory.

The State draws support for the alternative interpretation from Barnes v. People, 735 p2d, 869 (Colo. 1987) where the Colorado Court held that "...even where statutory language appears to create a mandatory presumption in criminal cases, courts commonly read the statute as creating only a permissive inference. "Barnes, p.872.

But this contention, although endorsed in Colorado, is simply false. Many courts do not read such statutes as creating only permissive inferences. The Florida Courts did not do so in Rolle v. State of Florida, the US Supreme Court did not do so in

Sandstrom or in Franklin, and the Montana Supreme Court did not do so either in Shea, or even in the case cited by the State in its Motion for Reconsideration, State v. Kramp.

In fact, the Montana Court is to be applauded for not taking the tactic of the Colorado Court, and the precedent for not doing so has been established in earlier cases. The standard is set forth in T&W. The Court held with respect to the prime facie presumption of constitutionality that "...every intendment in its favor will be made unless its unconstitutionality appears beyond a reasonable doubt" (T&W p. 1370) .

In cases involving the mandatory presumption, the Montana Supreme Court has found that there exists no reasonable doubt

that these presumptions are unconstitutional. In so finding, it has avoided both the invitation to legislate (by effectively rewriting the statute as per the Colorado Court) and the absurd conclusion that no statute is really unconstitutional since it can be rewritten as one which is not unconstitutional.

The second issue raised by the State in its Motion for Reconsideration is that Kramp provides the trial court with authorization to substitute "...proper jury instructions to protect a Defendant's rights."

In Kramp, the Defendant was charged with theft under 45-6-304 MCA and testimony was introduced that the Defendant was in possession of stolen property. Among the instructions presented to the jury was an

instruction that stated that although stolen property did not constitute proof of guilt, it nevertheless "...shall place a burden on the possessor to remove the effect of such fact..."(p.619).

The Montana Supreme Court held that this instruction was a due process violation (Kramp, p.614) and unconstitutionally shifted the burden of proof to the Defendant. Yet, it also held that since (1) the jury ought to be allowed to consider the unexplained possession of stolen property and infer from that fact the Defendant's involvement in the theft, and since (2) this consideration is important because it is the only direct evidence in the case which points to the Defendant's guilt, then the jury should be instructed as to the effect it may give such consideration. (Kramp

p.621).

The Supreme Court does not offer further explanation of its rationale, but it is important to venture a reconstruction of such explanation before addressing the State's argument.

The Court has surely authorized the reading of a permissive inference jury instruction in cases like Kramp. But what are the distinguishing factors of Kramp? A consideration of 26-1-501 & 502 MCA furnishes definitive insight into the conditions under which an inference may be made.

An "inference" is a deduction which the trier of fact may make from the evidence provided it is founded

(1) on a fact legally proved; and

(2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

In Kramp, the State did prove that the Defendant was in the unlawful possession of stolen property. The Supreme Court thus seems to be tacitly holding that from this legally proven fact, the inference of the Defendant's guilt is founded upon a deduction "...warranted by a consideration of the usual propensities or passions of men,...". That is; given that the unexplained illegal possession was direct evidence of the Defendant's guilt and the inference to that effect was one which reasonable people might typically draw, the Supreme Court supported the instruction upon retrial. This rationale is both compelling

and consistent with statutory requirements.

Tollefson however does not satisfy the above conditions of the Kramp instruction. First, evidence of the Defendant's BAC level is not direct evidence; information about a person's BAC level is instead circumstantial evidence of being under the influence.

More importantly, it is not evidence which, in itself, forms the basis from which reasonable people would typically draw conclusions about whether a person having particular BAC level is under the influence of alcohol.

In order to bring the jury to the point from which they would be likely to draw such conclusion, the State would need to introduce (presumably expert) testimony

which, after withstanding the scrutiny of cross examination, would purport to establish the strong likelihood that persons with a certain BAC level are indeed also under the influence of alcohol. Not only is it precisely this task which the State wishes to avoid by means of the instruction, such a maneuver does not invoke the "usual propensity" clause of 26-1-502 since it has required special testimony to convince the jurors of the importance of the BAC level. So either Kramp does not apply here, or the State (if the expert testimony is convincing) does not need the instruction.

This Court believes that such disputes are clearly factual in nature and in the absence of legislation to the contrary, should be battled out in the courtroom through the adversarial system. Here it is crucial that

the trial court does not assert itself as either a legislative body or as an expert witness for either party.

The Court assumes just such a function if, e.g., in a non-jury trial it concludes that a Defendant who has a .125 BAC level is, by virtue of that fact, under the influence of alcohol, when it has not heard any compelling testimony about the meaning and effect of BAC levels. To draw such a conclusion, the Court either has tacitly issued a legislative directive to itself which sanctions that type of inference, or has instead become an expert witness for the State. The Court must not do the former since it is not a legislative body. It must not do the latter since doing so would constitute a due process violation by depriving the Defendant of his right to

cross examine the State's most crucial witness (the Court) with regard to its "expertise".

The same rationale applies to considerations as to when to instruct the jury. Any instruction that informs the jury they may single out one particular fact as more significant than another sends the unmistakable message that (1) the Court so views that fact, (2) the supposition is somehow anchored in the law. The result is that the Court has effectively become both witness and legislator.

It is also worth noting that every set of stock jury instructions includes a statement or series of statements much like the following:

> You are the sole judges of the credibility of all the witnesses testifying in this case, and of the weight to be given their testimony. (Montana Criminal Jury Instruction, Instruction No. 1-003)

The weight of the evidence is to be decided on the strength of empirical data presented. The Court must not direct the jury on the one hand that they should decide what is important, and on the other select the BAC level as an item of singular importance from which they may draw an inference.

Thus, if the Court is to avoid action as legislator, and as expert witness for the State, and if the permissive inference instruction cannot be justified under the guidelines of Kramp, the instruction should

not be given.

In general however, the particular form and content of jury instructions must be decided at the time of trial. No final determination of these instructions can be made until the Court has reviewed the testimony and evidence submitted by each party.

Nonetheless, and for the reasons herein stated, the State's Motion to Reconsider is hereby denied.

So ordered.

7-13-89
ENTERED

/s/ David K. Clark
JUSTICE OF THE PEACE
DEPARTMENT #1